

Public Prosecutor v Tan Chee Seng & Ors

HIGH COURT (MUAR) — CRIMINAL TRIALS NO 45–15 OF 2000 AND 45–7 OF 2002

JEFFREY TAN J

21 AUGUST 2003

Criminal Procedure — Sentence — Disparity of sentences — Three accused persons participated in same offence — OKT1 and OKT3 attacked while OKT2 was nearby — Whether same sentence should be imposed on all three accused persons — Whether there should be disparity in the sentences

Criminal Procedure — Sentence — Mitigation — Three accused persons were first offenders — Three accused persons pleaded guilty — Whether lenient sentence could be imposed

The first and third accused persons (OKT1 and OKT3) attacked the deceased while the second accused person (OKT2) was nearby. All the accused persons had the intention to cause bodily harm as is likely to cause death to the deceased who passed away some time after that due to septicaemia. In the midst of the trial, the deputy public prosecutor tendered an alternative charge that was read and explained to the three accused persons who pleaded guilty. For all the accused persons, it was pleaded that they were all first offenders and that lenient sentences be imposed. The deputy public prosecutor stated that similar sentences should be imposed on all the accused persons.

Held, imposing a lighter sentence on OKT2:

- (1) Where two or more offenders are to be sentenced for the participation in the same offence, the sentence to be passed on them should be the same, unless there is a relevant difference in their responsibility for the offence or their personal circumstances (see para 15).
- (2) There was a call to impose a similar sentence on all three accused persons. But there are important considerations that warrant a disparity in the sentences, namely, the adolescence of OKT2 and the lesser role of OKT2 who had been omnipresent but had nonetheless not participated in the actual attack on the deceased. It would hardly be right to hold OKT2 as culpable as OKT1 and OKT3. There was a difference in the degree of culpability. There ought to be a disparity in the sentences, and with OKT2 to be given being the lower end of the range of sentences (see para 16).
- (3) All three accused persons were first offenders, but given the seriousness of the offence that would count for little. It was material that all the three accused persons pleaded guilty, even though the evidence against them for an offence under ss 302 or 304 of the Penal Code was not strong. Given the weak evidence of an offence under ss 302 or 304 of the Penal Code, the plea of guilt was a strong mitigating factor. That was not to say however that the accused persons had not therefore

- A** committed a most serious offence. A life was lost. The accused persons could not be let off with a lenient sentence. Imprisonment was the only option. The term of imprisonment must reflect the seriousness of the offence. The right and appropriate sentence was a term of imprisonment of eight years with effect from the date of arrest in the case of OKT1 and OKT3, and a term of imprisonment of six years with effect from the date of arrest in the case of OKT2 (see paras 17, 19).
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[Bahasa Malaysia summary]

- C** Tertuduh-tertuduh pertama dan ketiga telah menyerang si mati sementara tertuduh kedua berada berhampiran. Ketiga-tiga tertuduh mempunyai niat untuk menyebabkan kecederaan yang mungkin menyebabkan kematian kepada si mati yang telah meninggal dunia setelah itu oleh kerana septisemia. Semasa perbicaraan, timbalan pendakwa raya telah mengemukakan dakwaan alternatif yang telah dibaca dan diterangkan kepada ketiga-tiga tertuduh yang telah membuatakuan bersalah. Ia telah dinyatakan untuk ketiga-tiga tertuduh bahawa mereka merupakan pesalah kali pertama dan hukuman ringan patut dikenakan. Timbalan pendakwa raya menyatakan bahawa hukuman yang sama patut dijatuhkan ke atas tertuduh-tuduh.
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Diputuskan, menjatuhkan hukuman yang lebih ringan ke atas OKT2:

- E** (1) Di mana dua atau lebih tertuduh dihukum untuk penglibatan mereka di dalam kesalahan yang sama, hukuman yang patut dijatuhkan ke atas mereka sepatutnya sama, kecuali jika ada perbezaan yang relevan di dalam tanggungjawab mereka di dalam kesalahan itu atau keadaan peribadi mereka (lihat perenggan 15).
- F** (2) Terdapat permohonan untuk menjatuhkan hukuman yang sama ke atas ketiga-tiga tertuduh. Tetapi terdapat pertimbangan yang penting yang mewajarkan perbezaan di dalam hukuman-hukuman, iaitu keremajaan OKT2 dan peranan OKT2 yang kurang yang telah hadir tetapi tidak memainkan peranan di dalam serangan ke atas si mati. Tidak betul jika OKT2 dianggap bersalah seperti OKT1 dan OKT3. Terdapat perbezaan di dalam tahap kebersalahan. Hukuman ke atas ketiga-tiga tertuduh patut berbeza dengan OKT2 diberi hukuman yang lebih ringan (lihat perenggan 16).
- G**
- H** (3) Ketiga-tiga tertuduh merupakan pesalah kali pertama, tetapi memandangkan keseriusan kesalahan itu, ini memberi kesan yang kecil. Ia penting bahawa ketiga-tiga tertuduh mengaku bersalah, walaupun keterangan terhadap mereka untuk kesalahan di bawah ss302 atau 304 Kanun Keseksaan tidak kukuh. Memandangkan keterangan untuk kesalahan di bawah ss 302 atau 304 Kanun Keseksaan tidak kukuh, pengakuan bersalah adalah faktor peringanan yang kuat. Ini tidak bermakna bahawa ketiga-tiga tertuduh tidak melakukan kesalahan yang serius. Seorang telah meninggal dunia. Tertuduh-tertuduh tidak boleh dikenakan dengan hukuman ringan. Pemenjaraan adalah perlu.
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Tempoh pemenjaraan mesti mencerminkan keseriusan kesalahan itu. Hukuman yang betul dan sesuai adalah untuk tempoh lapan tahun penjara bermula daripada tarikh tangkapan untuk OKT1 dan OKT3, dan tempoh enam tahun penjara daripada tarikh tangkapan untuk OKT2 (lihat perenggan-perenggan 17, 19).]

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Notes

For cases on disparity of sentences, see 5 *Mallal' Digest* (4th Ed, 2001 Reissue) para 3091.

For cases on mitigation, see 5 *Mallal' Digest* (4th Ed, 2001 Reissue) paras 3296–3302.

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C

Cases referred to

Chia Kah Boon v Public Prosecutor [1999] 4 SLR 72 (refd)

Fu Foo Tong & Ors v Public Prosecutor [1995] 1 SLR 448 (refd)

Joginder Singh v PP [1984] 2 MLJ 133 (refd)

D

Lee Yoke Choong v Public Prosecutor [1964] MLJ 138 (refd)

Lee Peng Kong v Public Prosecutor [1986] 2 CLJ 139 (refd)

Low Oi Lin v Rex [1949] MLJ 210 (refd)

Mohamed Jusoh bin Abdullah & Anor v Public Prosecutor [1947] MLJ 130 (refd)

Mohamad Abdullah Ang Swee Kang v PP [[1988] 1 MLJ 167 (refd)

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PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)

PP v Khairuddin [1982] 1 MLJ 331 (refd)

PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)

PP v Mohd Amin bin Mohd Razali & Ors [2002] 5 MLJ 406 (refd)

PP v Mohd Nooh bin Yusof & Ors 5 *Mallal's Digest* (4th Ed, 1997 Revision) para 2918 (refd)

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PP v Nazarudin bin Ahmad & Ors [1993] 2 MLJ 9 (refd)

PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)

PP v Ramlee and another action [1998] 3 SLR 539 (refd)

PR v Adam bin Mohamad 5 *Mallal's Digest* (4th Ed, 1997 Revised) para 2908 (refd)

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R v Boyd [(1980) 2 Cr App R(S) 234 (refd)

R v Kenneth John Ball [1951] 35 Cr App R 164 (refd)

Reg v Murukaiyan Rasoo [1957] MLJ 26 (refd)

Reg v WN Hammar [1958] MLJ 4 (refd)

Yap Teng Chai v PP [1959] MLJ 205 (refd)

Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)

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Legislation referred to

Penal Code ss 302 or 304

Ahmad Zubir bin Jantan (Attorney-General's Chambers) for the public prosecutor.

Wendy Ooi (Ooi Sam Heng & Associates) for the first accused.

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Chelvarajan R Suppiah (Chelva R Suppiah & Co) for the second accused.

Sukhdev Singh (Sukhdev & Associates) for the third accused.

A Jeffrey Tan J:

[1] Out of the blue, in the midst of the murder trial, the learned deputy public prosecutor (Ahmad Zubir bin Jantan) tendered an alternative charge (P7), that was then read and explained to all three accused, who then pleaded guilty to the following offence:

- B** Bahawa kamu bersama-sama seorang lagi yang masih bebas, pada 1.11.1999 jam lebih kurang 8.00 hingga 9.05 malam di sebuah warung makan di Jalan Sisi, dalam daerah Muar, di dalam Negeri Johor Darul Takzim, dengan memajukan niat bersama telah menyebabkan kematian R SELVAM A/L RAMAN (K/P NO:770112-01-7239) dengan niat menyebabkan kecederaan tubuh badan yang boleh membawa kematian. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan.
- C**

- [2]** And after the statement of facts of the case (P8) that the learned DPP presented was read and explained to them, all three accused admitted the following: (a) at about 9pm on 1 November 1999, the complainant was informed that his brother, the deceased, was attacked by several persons, (b) the complainant found the deceased in a critical state at the district hospital, (c) meantime, the first accused was apprehended at the scene by two members of the public and was handed to the police, while the second accused was arrested on 3 November 1999 and the third accused was arrested on 23 December 2001, (d) the deceased was attacked with a knife and an axe by the first and third accused, (e) nearby the scene was the second accused who had promised the first and third accused that he (second accused) would join their gang if they (first and third accused) would avenge the assault on him (second accused) by the deceased, (f) it was the common intention of all to cause such bodily injury as is likely to cause death, (g) the deceased died on 17 November 1999.
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- E**
- F**

[3] Pertinent to the facts of the case, the learned DPP also tendered the scabbard of a knife (P9), and an axe (P10).

- [4]** Being satisfied that all three accused fully understood the nature and consequences of their plea and as well admitted without any qualification the alleged charge against them, and that the alleged offence had been disclosed, the court accepted the plea of guilt and recorded a conviction against them.
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- [5]** But before that, during the murder trial, a government pathologist (PW3 - Dr Shahidan bin Mohd Noor) had testified that on 18 November 1999 he conducted the post-mortem on the deceased. PW3 testified that he found multiple incised wounds on the hands, forearm, calves, thighs, and back of the accused (see pp 19-20 of the notes of proceedings). Those wounds had healed to a certain extent. There were bloodstained fluids in the chest cavity. Death was caused by septicaemia. Germs had invaded the blood stream through the wounds. The deceased was discharged on 6 November 1999 but was readmitted on 8 November 1999. Those wounds would not have been sufficient to cause death in the ordinary course of nature without
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septicaemia. And other prosecution witnesses had tendered five photographs of the scene - P4(1-5), one photograph of the said axe, and eight photographs of the deceased - P6(1-8).

[6] Miss Wendy Ooi for OKT1 mitigated as follows. OKT1 was a first offender who was 19 years old at the material time. When he was 11, he lost his mother, and when he was 15, his father, a fisherman, remarried. He was a mosaic worker. He was educated up to the primary school level. It was more of gang fight, as all three accused were from the same gang. It was a moment of folly. The wounds were inflicted on the limbs and not on the vital parts of the body. The intention was not to kill. The intention was to cause injury. The first accused held the said axe. Miss Ooi asked for a lenient sentence.

[7] Mr Chelvarajan R Suppiah for OKT2 said that his client was a 16year old Form 3 student at the material time. OKT2 was about to be promoted to Form 4. At the Lower School Examination, OKT2 obtained 3As, 2 Bs, 1 C, and 1 D. He was a school prefect. His father is a sales executive in a motor company, while his mother is a housewife. He is the eldest of three siblings. The deceased had assaulted OKT2. OKT2 enlisted the help of OKT1 and OKT3. OKT2 surrendered to the police. OKT2 assisted the police. OKT2 has suffered greatly and wishes to continue with his education. Mr Chelvarajah made a similar plea for a lenient sentence.

[8] Mr. Sukhdev Singh for OKT3 said that his client was 29 years old at the material time. OKT3 was educated up to the primary school level. OKT3 was a carpenter. His income, when he had work, was about RM1,500 per month. OKT3 supported his parents.

[9] OKT3's father has lost one hand and is physically handicapped. There was no intention to kill. Mr Sukhdev asked for a second chance to be given to OKT3, and indicated that a term of imprisonment of seven to eight years would be fair.

[10] The learned DPP said that it was OKT1 who accepted the 'assignment'. The offence was committed in a public place. It was a planned and premeditated attack. At the material time, the deceased was eating with his friends. The deceased was powerless to resist.

[11] OKT3 was the oldest and was therefore the most culpable. A deterrent sentence should be imposed to 'curb' similar offences. A similar sentence should be imposed on all the accused persons. And the learned DPP proposed a term of imprisonment of 15 years.

[12] None said it, but '... in deciding the appropriate sentence ... the first and foremost consideration is the public interest' (*R v Kenneth John Ball* [1951] 35 Cr App R 164; see also *Reg v Murukaiyan Rasoo* [1957] MLJ 26). The court shall pass sentence according to law. A 'sentence according to law' means that the sentence must not only be within the ambit of the

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- A** punishable section, but it must also be assessed and passed in accordance with established judicial principles (*Public Prosecutor v Jafa bin Daud* [1981] 1 MLJ 315, at p 316 per Mohamed Azmi J, as he then was). ‘The first and foremost consideration of punishment is the public interest. ... [Because] the object of punishing crime is ... also to deter others’ *Yap Teng Chai v PP* [1959] MLJ 205, at p 206; see also *Reg v WN Hammar* [1958] MLJ 4).
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- [13]** In assessing sentence, all the circumstances of the offence should be considered (*Low Oi Lin v Rex* [1949] MLJ 210). ‘The court in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received if the crime is one of violence, the antecedents of the prisoner up to the time of the sentences, his age and character’ (*Mohamed Jusoh bin Abdullah & Anor v Public Prosecutor* [1947] MLJ 130, citing *Halsbury’s Laws of England* (Hailsam Ed) Vol 9, para 365). ‘Courts are duty bound to consider all these matters before deciding upon a suitable sentences’ *Joginder Singh v PP* [1984] 2 MLJ 133 per Ajaib Singh J (as he then was). The sentences must be one appropriate to the gravity of the offence (*Lee Yoke Choong v Public Prosecutor* [1964] MLJ 138). The sentences should reflect the seriousness of the offence (*Public Prosecutor v Khairuddin* [1982] 1 MLJ 331).
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- E** **[14]** Mitigating factors are not to be disregarded, even if the offence calls for a deterrent sentence; *Lee Peng Kong v Public Prosecutor* [1986] 2 CLJ 139. That is not to say that ‘the circumstances of the individual offender are more important than the protection of innocent members of the community from injury to their persons, or from risk even to their lives’ (*R v Murukaiyan Rasoo*). Public interest must not be relegated to the background. ‘The correct approach is to strike a balance, so far as possible, between the interest of the public and the interest of the accused’ (*PP v Loo Choon Fatt* [1976] 2 MLJ 256, at p 258 per Hashim Yeop A Sani J, as he then was; see also *PR v Adam bin Mohamad 5 Mallal’s Digest* (4th Ed, 1997 Revised) para 2908 and *PP v Mohd Nooh bin Yusof & Ors 5 Mallal’s Digest* (4th Ed, 1997 Revision) para 2918). ‘A court has the discretion to be lenient and merciful provided there are extenuating circumstances and it is in the public interest to do so’ (*PP v Khairuddin*).
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- H** **[15]** Where two or more offenders are to be sentenced for the participation in the same offence, ‘the sentence to be passed on them should be the same, unless there is a relevant difference in their responsibility for the offence or their personal circumstances’ (Archbold 1993, and quoted in *PP v Nazarudin bin Ahmad & Ors* [1993] 2 MLJ 9). ‘... the general rule is that any unjust disparity should be avoided. However, there is nothing to prevent the court from imposing a range of sentences on the accused persons if there are important considerations for so doing’. ‘A difference in the sentences imposed on co-defendants may be justified by their different roles in the offence ...’ (Archbold 2002 para 5-170). The ages of the accused persons, the degrees
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of culpability and the differences in mitigation are amongst some of the important factors which warrant a disparity in sentences' (*Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45, and quoted in *PP v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406). A first offender may be given a lighter sentence; *Fu Foo Tong & Ors v Public Prosecutor* [1995] 1 SLR 448), but a serious disparity of sentences should be avoided *Public Prosecutor v Ramlee and another action* [1998] 3 SLR 539).

[16] In the instant case, there was a call to impose a similar sentence on all three accused persons. But there are important considerations that warrant a disparity in the sentences, namely, the adolescence of OKT2 who was 16 at the material time, and the lesser role of OKT2 who had been omnipresent but had nonetheless not participated in the actual attack on the deceased. Given those considerations, it would hardly be right to hold OKT2 as culpable as OKT1 and OKT3. There was a difference in the degree of culpability, a fact that the learned DPP recognized and admitted as much when he said that OKT3 was the most culpable. There ought to be a disparity in the sentences, and with OKT2 to be given being the lower end of the range of sentences.

[17] What would be the appropriate range of sentences? All three accused persons are first offenders, but given the seriousness of the offence that would count for little. All three accused persons pleaded guilty to the offence. Now that is a fact most material, for 'Whether a person is a hardened criminal or not, ... a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of lengthy trial but also saves time and inconvenience of many, particularly the witnesses' (*Sau Soo Kim v PP* [1975] 2 MLJ 134, at p 137, per Lee Hun Hoe CJ Borneo). As observed by Visu Sinnadurai J in the oft-quoted case of *PP v Ravindran & Ors* [1993] 1 MLJ 45, at p 51, 'It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty. The rationale for this rule is that much public time and money will be spared if an accused admits his guilt, thus avoiding a prolonged and unnecessary trial'. And as further observed by Visu Sinnadurai J, 'The general rule that an accused person who pleads guilty is entitled to a discount was applied by our Supreme Court in *Mohamad Abdullah Ang Swee Kang v PP* [[1988] 1 MLJ 167]. The Supreme Court adopted with approval the views expressed by Cumming-Bruce LJ in *R v Boyd* [(1980) 2 Cr App R(S) 234] where he said: "The policy of the court is that where a man does plead guilt, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty"'.

[18] In *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1MLJ 167, at p 170, Mohamed Azmi SCJ imparted the following guide:

In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence

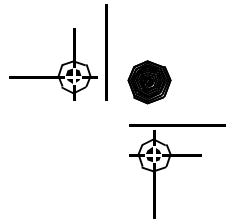
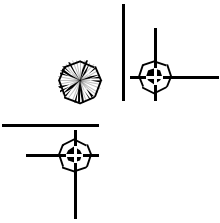
- A** committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James LJ. in *R v Ladd & Tristram* [1975] Cr LR 50:
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- C** ‘We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified.’

- D** A sentencer must give sufficient discount for all extenuating circumstances pertaining to the degree of culpability or criminality involved, which must necessarily vary from case to case apart from other mitigating factors. Unless there is a proper reason for withholding such credits, failure to do so may result in the sentencer not exercising his or her discretion judicially in assessing the level of custodial sentence. In *R v Meade* (1982) 4 Cr App R (S) 193; Cr LR 613, a young man who pleaded guilty to arson was granted a reduction in his sentence of six years’ imprisonment in what would otherwise have been the proper sentence for such a serious offence. In the course of his judgment, Lord Lane CJ said:
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- F** ‘A term of five to six years, whatever the age of the offender may be, is in many cases of using a petrol bomb a perfectly appropriate sentence, because these weapons are rightly called bombs. They can cause the most fearful injuries and this case demonstrates the sort of damage they can cause to property. But having said that, the help that he gave to the police and his plea of guilty earn him a discount, which does not appear to have been given by the judge’.

- G** [19] It is also material that all the three accused persons pleaded guilty, even though the evidence against them for an offence under ss 302 or 304 of the Penal Code was not strong. The medical evidence was that the bodily injuries were not as such as were likely to cause death. As a matter of fact, the deceased was discharged from the hospital. The medical evidence was that it was septicemia that ultimately killed the deceased after he was readmitted. Fairly said, if not for the plea of guilty, the prosecution would not have had an easy way to prove an offence under ss 302 or 304 of the Penal Code. Given the weak evidence of an offence under ss 302 or 304 of the Penal Code, the plea of guilt is a strong mitigating factor (see *Chia Kah Boon v Public Prosecutor* [1999] 4 SLR 72). That is not to say however that the accused had not therefore committed a most serious offence. A life was lost. The accused could not be let off with a lenient sentence. Imprisonment is the only option. The term of imprisonment must reflect the seriousness of the offence. And when all things are considered, the right and appropriate sentence is a term of imprisonment of eight years with effect from the date
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of arrest in the case of OKT1 and OKT3, and a term of imprisonment of six years with effect from the date of arrest in the case of OKT2. **A**

A lighter sentence imposed on OKT2.

Reported by Chew Phye Ken

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